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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1667

CITIZENS BANK & TRUST COMPANY OF PARK RIDGE, ILLINOIS,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Citizens Bank & Trust Company, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on February 2, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A *infra* 1a-17a) is recorded at 592 F.2d 364 (1979). No opinion was written by the District Court on the issue for which the Writ is sought. The order of the District Court on the motion raising the issues for which the Writ is sought is contained in the Appendix (App. B p. 18a).

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1979. (App. A) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the FDIC is immune from just claims of unpaid creditors of an insolvent bank where the FDIC as a receiver and in its corporate capacity has entered into a "purchase-assumption" transaction which stripped the receivership estate of all assets but protected other creditors including the FDIC and depositors in the full amount of their respective claims.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the National Bank Act ("NBA"), 12 U.S.C. §§ 91 and 194; Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. §§ 1819, 1821 and 1823; Federal Tort Claims Act ("FTCA") 28 U.S.C. §§ 1346, 2679 and 2680; and Ohio Revised Code ("ORC") § 1113.05(M) are contained in the Appendix (App. C *infra*, pp. 19a-27a).

STATEMENT OF THE CASE

This case arises out of the insolvency of the Northern Ohio Bank ("NOB") in Cleveland, Ohio. The FDIC as receiver and in its corporate capacity liquidated NOB under the powers granted to it and the limitations placed upon it by the NBA and the FDIA. Petitioner, Citizens Bank & Trust Co. ("Citizens") is a creditor of NOB, who because of the actions of the FDIC in excess of its authority, has been denied the right to collect any of the amount it was due. The Seventh Circuit unlike the Ninth Circuit, would affirm the immunity of the FDIC and deny any means of redress by its holding that Citizens' claim against the FDIC is barred by the doctrine of sovereign immunity.

Citizens' claim arises from a loan to Gananda Development Corporation ("Gananda") made by NOB prior to its insolvency. Citizens' participation in the Gananda loan in the amount of $348,000 was made in reliance upon the unequivocal representations by NOB that the loan was secured by collateral. Only after Gananda defaulted did Citizens discover that NOB had induced Citizens to participate by its misrepresentations that the loan to Gananda was fully secured by collateral when it was not. Citizens attempted to negotiate with NOB for the return of Citizens' $348,000, because of the misrepresentations, negligence and breach of contract by NOB. (App. A pp. 2a-3a).

During all times relevant hereto, NOB maintained a correspondent account with Citizens. At the time of insolvency the amount in the account was $300,868.84. (App. A p. 3a).

On Friday, February 14, 1975, NOB was declared insolvent and the FDIC was appointed Receiver by the Ohio Superintendent of Banks. On Monday, February 17, the FDIC as Receiver filed an *ex parte* petition in the Ohio courts seeking approval of a "purchase-assumption" transaction pursuant to the purported authority granted to the FDIC in 12 U.S.C. § 1823(e). (App. A p. 3a) It is the terms of this purchase-assumption transaction, the total exclusion of certain creditors of NOB and the claimed immunity of the FDIC which Citizens contests in this suit.

The purchase-assumption transaction is reflected in two separate contracts: one between the FDIC as receiver of NOB and National City Bank of Cleveland, the "assuming bank," and the other between the FDIC in its corporate capacity and the FDIC as receiver of NOB. These agreements (jointly referred to as the purchase-assumption transaction) provided that National City Bank would purchase and assume all of the deposit liabilities, certain other liabilities and other "acceptable assets" of NOB consisting of cash, deposits in other banks and certain other assets. National City Bank paid a $3,750,000 premium for the value of the ongoing business of NOB. (App. A p. 3a).

By the terms of the second contract, the FDIC in its corporate capacity purchased all assets of NOB which were not assumed by National City Bank, from itself as Receiver. For these assets, the FDIC in its corporate capacity paid to the FDIC as receiver the amount of $90,250,000 which sum was turned over to National City Bank by the FDIC as receiver as part of the assets of NOB. Among the assets transferred to the FDIC in its corporate capacity from the FDIC as receiver were the Gananda loan and the correspondent account of NOB with Citizens. (App. A pp. 3a-4a).

Under the terms of the contract between the FDIC and itself as Receiver, the FDIC in its corporate capacity will retain all amounts recovered through liquidation of the assets sold until the FDIC in its corporate capacity has recovered the full amount of its purchase price ($90,250,000), all costs of liquidation and 6½% interest on any recovered balance, calculated monthly. (App. A p. 3a) The effect of this transaction was to strip the receivership estate of NOB of all assets from which recovery might be had for creditors such as Citizens whose claim was not assumed by National City Bank. The transaction effectively left all liabilities with the FDIC as receiver and therefore little or no prospect of any recovery for creditors whose claims were not assumed. (App. A p. 4a).

On March 12, 1975, the FDIC as receiver demanded payment from Citizens of the balance in NOB's correspondent account. By letters in response to this demand Citizens refused to comply and informed the FDIC that NOB was liable to Citizens in the amount of $348,000 by reason of the fraud, breach of contract and negligence committed by NOB in inducing Citizens' participation in the Gananda loan. Citizens also informed the FDIC that the amount in the correspondent account had been set off against the amount due to Citizens. (App. A p. 4a).

On August 19, 1975, the FDIC in its corporate capacity brought this action against Citizens in the Northern District of Illinois to recover the amount in the NOB correspondent account ($300,868.84). Jurisdiction was predicated upon 12 U.S.C. § 1819. Citizens filed an answer and affirmative defenses claiming the right to set-off the amount owed to it by NOB because of the fraud, breach of contract and negligence of NOB in the Gananda loan, an asset transferred to the FDIC as a part of the purchase-assumption transaction. Citizens also counter-

claimed for the approximately $48,000 difference between the amount of its participation in the Gananda loan and the amount of the set-off. (App. A p. 4a).

In the District Court, the FDIC moved to strike and dismiss Citizens' affirmative defenses and counterclaims asserting, in part, that Citizens' claim was unenforceable against the FDIC by reason of sovereign immunity. The District Court granted the FDIC's motion thereby denying Citizens the right to set off the debt owed to NOB against the debt owed by NOB to Citizens. (App. B p. 18a) Shortly thereafter, the District Court granted summary judgment in favor of the FDIC on its claim against Citizens. Citizens appealed the judgment and the prior order of the District Court granting the motion of the FDIC to strike and dismiss Citizens' affirmative defenses and counterclaims.[1]

The Court of Appeals for the Seventh Circuit, in an unprecedented decision, held that the FDIC was immune from suits of creditors whose claims were not assumed, even though the actions of the FDIC were in breach of its statutory duties and in excess of its statutory authority. (App. A). This sweeping expansion of the doctrine of sovereign immunity through the unwarranted application and interpretation of the Federal Tort Claims Act ("FTCA") is a crucial issue of federal law and one of national importance which should be addressed by the Supreme Court. The importance of consideration by this Court is highlighted by the conflict between the Seventh Circuit decision in the instant case and a decision of the Ninth Circuit Court of Appeals in *First Empire Bank v. FDIC*, 572 F.2d 1361, *cert. denied*, ... U.S. ....., 99 S.Ct. 293 (October 16, 1978).

[1] Although other rulings of the District Court were appealed and affirmed, Citizens seeks review only of the judgment entered and affirmed and the ruling of the Seventh Circuit that the FDIC is immune.

REASONS FOR GRANTING THE PETITION

The unprecedented and unwarranted extension of the doctrine of sovereign immunity by the Seventh Circuit should be reviewed by the Supreme Court because:

a) the interpretation and interrelationship of the FTCA, the exceptions thereto, and the amenability of a "sue-and-be-sued" agency to suit presents important questions of federal law not previously considered by this Court and,

b) the erroneous decision of the Seventh Circuit affirming the immunity of the FDIC is in conflict with a decision of the Ninth Circuit in *First Empire* affirming a judgment against the FDIC in strikingly similar circumstances.

INTRODUCTION

The FDIC is a federal agency, established as a corporation by Congress with certain powers, duties and limitations. 12 U.S.C. § 1811 *et seq.* One such power is "To sue and be sued." 12 U.S.C. § 1819 Fourth. (App. C p. 20a) One of the duties imposed upon the FDIC is to act as Receiver of insolvent banks when appointed by the Comptroller of Currency in the case of national banks (12 U.S.C. § 1821(c)) or the appropriate State official (12 U.S.C. § 1821(e); O.R.C. § 1113.05(M)).[2]

The FDIC in its corporate capacity is also empowered in some circumstances to take certain steps in the case of a failed or failing bank, including entry into a purchase-assumption transaction. 12 U.S.C. § 1823(e). In numerous instances in recent years, the FDIC has been

[2] In this case, the FDIC opted to liquidate NOB in such manner and using such procedures as are "permitted by the laws of the United States" O.R.C. § 1113.05(M) (App. C p. 27a).

appointed receiver of a failed bank and has then entered into a purchase-assumption transaction with itself as receiver of the failed bank.

The FDIC also operates within the requirements of the NBA. 12 U.S.C. § 21 *et seq.* 12 U.S.C. § 91 voids any payment of money after an act of insolvency which would prevent the application of assets as elsewhere provided in the NBA or in "preference of one creditor to another." 12 U.S.C. § 194 requires that the assets of a failed bank be distributed *ratably*. The NBA has been consistently interpreted as voiding any preferences between creditors and as requiring a ratable distribution between all creditors. *Mechanics Universal Joint Co. v. Culhane*, 299 U.S. 51, 53 (1936); *Blakey v. Brinson*, 286 U.S. 254, 263 (1932); *First National Bank of Selma v. Colby*, 88 U.S. 609, 613 (1875); *U.S. ex rel. White v. Knox*, 111 U.S. 784 (1884); *Cook County National Bank v. U.S.*, 107 U.S. 445, 450 (1883).[3]

The FDIC as Receiver liquidating, as here, a bank in accordance with the laws of the United States stands in the shoes of the insolvent bank; the FDIC as Receiver takes all of the assets of the bank subject to all the claims and defenses which could have been interposed against the bank.[4]

[3] Ohio law also requires a pro rata distribution of assets of the closed bank. (App. A p. 8a)

[4] In *Scott v. Armstrong* 146 U.S. 499, 510 (1892) this Court held that it is only the "balance [of money], if any, after the set-off is deducted which can justly be held to form assets of the insolvent." See also *Ticonic National Bank v. Sprague* 303 U.S. 406 (1938); *Willing v. Binenstock* 302 U.S. 272 (1937); *Hoffman v. Gleason* 107 F.2d 101, 103 (6th Cir. 1940); *Union Properties v. Baldwin Bros. Co.* 141 Ohio St. 303, 47 N.E.2d 983, 985 (1943). It is doubtful then that the FDIC as receiver could "sell" the "asset" of NOB's correspondent account to the FDIC at all since the account was subject to Citizens' set-off.

It is within the framework of these very specific requirements and limitations that the FDIC must tailor its purchase-assumption transactions. By arranging the purchase-assumption transaction on such terms as to deny any share to some creditors while depositors and creditors, whose claims are assumed are paid in full, the FDIC has exceeded the specific authority granted to it by law.

The Seventh Circuit indicates that the FDIC did not perform its statutory duty and that Citizens was damaged by these actions:

> "[I]f Citizens is right . . . FDIC in its capacity as receiver had a duty to accord creditors of NOB their right to pro rata distribution . . . "
>
> "Furthermore, FDIC may very well have had a duty as receiver to protect Citizens' right to a set-off against the receivership estate's claim against Citizens". (App. A p. 8a)
>
> * * *
>
> "It may well be that FDIC has violated Citizens' right as a creditor by entering into and executing a purchase assumption transaction in which the claims of other creditors were preferred over Citizens' claim and no assets were left in the receivership estate from which Citizens can satisfy its claim. The doctrine of sovereign immunity, however, by its very nature, disallows just claims against the sovereign and its instrumentalities." (App. A p. 17a)

The Seventh Circuit further indicates its view that Citizens does indeed have a meritorious claim but that its interpretation of the FTCA requires the conclusion that the FDIC is immune; that Citizens is therefore not entitled to its day in court even as a set-off to prevent the entry of judgment against Citizens. The Seventh Circuit by its opinion has further confused the mysterious maze of rules, exceptions, interpretations and misconceptions surrounding the doctrine of sovereign immunity. At this

point and under these circumstances, it is appropriate for this Court to provide guidance to claimants and governmental agencies both, on the peculiarly federal question of immunity. In this case the necessity of guidance is particularly pressing since the decision of the Seventh Circuit that the FDIC is immune from creditors' claims is in direct conflict with the opinion of the Ninth Circuit in *First Empire* granting a *set-off* and *judgment* against FDIC in favor of unpaid creditors of an insolvent bank.

The Seventh Circuit recognizes this conflict and, in fact, effectively states the crucial importance of uniformity between circuits on so important an issue:[5]

> "The suability of a government corporation, however, is an issue of national law on which it is especially important that the law among the circuits should be uniform. It would be worse than incongruous if the vulnerability of a governmental corporation such as FDIC to a suit for tort depended upon the circuit in which the action was brought. Forum shopping would be encouraged, and transferability of cases under Section 1404(a) and even under Section 1406(a) of Title 28 would be inhibited. (App. A pp. 12a-13a).

THE FDIC IS NOT IMMUNE FROM CLAIMS (OR SET-OFFS) WHERE THE ACTIONS TAKEN BY IT WERE IN EXCESS OF THE AUTHORITY GRANTED TO IT UNDER THE NBA AND FDIA.

The holding of the Seventh Circuit applying the FTCA and its exceptions is an erroneous extension of the FTCA into areas to which it does not, on its face, apply and was never intended to be applied. Since the FTCA is inapplicable where the FDIC has exceeded its

[5] The Seventh Circuit considered the question of sovereign immunity sufficiently important to re-examine its earlier opinion in *Baker v. F & F Investment Co.* 489 F.2d 829 (7th Cir. 1973) and overrule its view stated in *Baker* that the FTCA was not the exclusive remedy for torts excepted from the act (App. A p. 13a).

authority, the FDIC is amenable to suit by reason of the "sue-and-be-sued" waiver of immunity.

The Seventh Circuit in essence reasons that the breach of a statutory duty by the FDIC is a tort; the FTCA must be applied, but the claim of Citizens falls within the "discretionary" exception of 28 U.S.C. § 2680(a) and as to any "excepted" tort the FDIC is immune. The "breached" duty, as set forth by the Seventh Circuit, arises from the statutory limitations placed upon the FDIC to distribute the assets pro rata, not prefer one creditor over another and to protect Citizens' right to a set-off.[6]

The FTCA provides in part that:

> . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury, or death caused by the *negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.* 28 U.S.C. § 1346(b) [Emphasis added][7]

The purpose of the FTCA, as shown in its legislative history and in repeated court decisions, was to waive the immunity of the sovereign for the tortious conduct of its employees; uppermost in the mind of Congress was an intent to provide a remedy for "ordinary common-law torts" such as "negligence in the operation of vehicles."

[6] Although the Court notes that this duty arises from state law in the instant case, such a conclusion is not necessarily correct since the FDIC opted to liquidate NOB in accordance with Federal law and procedures, (O.R.C. § 1113.05(M)) including not only § 1823(e) but also 12 U.S.C. § 91 and 194.

[7] 28 U.S.C. § 2679(a) merely removes the amenability to suit of a sue-and-be-sued agency for torts which fall within the ambit of the act in the first place.

Dalehite v. United States, 346 U.S. 15, 28 (1952). The typical tort which does fall within the FTCA is illustrated in the cases cited by the Seventh Circuit.[8]

As the Seventh Circuit recognizes, the purpose of the FTCA was to expand the amenability of government to suits for damages and to codify the existing law of immunity. (App. A p. 14a) The "primary purpose [of the FTCA] was to extend a remedy to those who had been without." *Feres v. U.S.*, 340 U.S. 135, 140 (1950). In this case, however, the Seventh Circuit has distorted the intent of Congress and has slammed the door on suits which could have been brought prior to the passage of the FTCA.[9] The FTCA, however, is only applicable if a private person would be liable in accordance with the law of the place where the act occurred. An attempt to vindicate a right because of the failure of an agency of the United States to carry out its statutory duty and in excess of its power cannot be compared to the liability of a private individual under state law and does not on its face fall within the ambit of the FTCA. *U.S. v. Smith*, 324 F.2d 622 (5th Cir. 1963).

The Seventh Circuit bases its confusing expansion of the FTCA upon the so-called "discretionary" exception of the FTCA. 28 U.S.C. § 2680(a). (App. C p. 26a). This exception immunizes officials when acting with "due care" in the execution of a statute.

[8] *Freeling v. FDIC*, 221 F.Supp. 955 (WD Okla. 1962), slander; *James v. FDIC* 231 F.Supp. 475 (WD La. 1964), slander; *Safeway Portland EFCU v. FDIC*, 506 F.2d 1213 (9th Cir. 1974), aiding in a scheme to defraud; *Edelman v. FHA*, 382 F.2d 594 (2nd Cir. 1967), fraud and misrepresentation. (App. A pp. 10a-11a)

[9] The Seventh Circuit states: "Before the adoption of the Federal Tort Claims Act, FDIC would have been amenable to suit on a claim such as Citizens' by reason of the sue-and-be-sued language in 12 U.S.C. § 1819 Fourth". (App. A pp. 8a-9a)

The FDIC however must act within the limits of the FDIA and NBA, including the anti-preference and pro rata requirements. The actions of the FDIC in this case, in excluding some creditors *in toto* from the purchase-assumption transaction, was inconsistent with the purposes of the applicable sections and in excess of its statutory power. The violation of its duties and actions in excess of the power of the FDIC is not a "discretionary" act, or a choice between permissible alternatives. Since the FDIC does not possess the discretion to violate its duty and exceed its powers, the "discretionary" exception is inapplicable.[10] Where the actions taken exceed the power granted by statute, an officer or agency is not immune under the doctrine of sovereign immunity. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1948); *Martinez v. Marshall*, 573 F.2d 555 (9th Cir. 1978).

The Seventh Circuit has however expanded the FTCA to the point where any action taken, no matter how arbitrary, excessive or beyond the statutory powers, can be immunized by the application of the discretionary exception from any actions by parties intended to be protected by the statute. This is contrary to the clear intent of Congress in passing the FTCA and in providing a "sue-and-be-sued" waiver of immunity. The FTCA cannot be considered in a vacuum but should be construed to fit within the statutory system of remedies against governmental agencies so as to make a "workable, consistent and equitable whole". *Feres v. U.S.*, 340 U.S. 135, 139 (1950).

[10] 12 U.S.C. § 1823(e) requires the Board of Directors of the FDIC to make a decision to decide whether the FDIC will enter into a purchase-assumption transaction, but does not excuse the requirements of other sections of the FDIA and NBA.

This Court has repeatedly and in detail discussed the amenability of sue-and-be-sued agencies to suit and the reasons for this blanket waiver of immunity. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939); *Federal Housing Administration v. Burr*, 309 U.S. 242 (1940); *Reconstruction Finance Corporation v. J. G. Menihan Corp.*, 312 U.S. 81 (1941). Where the FTCA is not applicable, the sue-and-be-sued clause must be applied. The Seventh Circuit has distorted the doctrine of sovereign immunity by pigeonholing the claim in this case as a tort and then applying the "discretionary" exception.[11]

Such a ruling erroneously narrows the range of potential suits against a sue-and-be-sued agency, if indeed, sue-and-be-sued amenability to suit has not already been interpreted out of existence. Although the Seventh Circuit has greatly enlarged the protection of immunity, its ill-considered decision can only increase the "widespread dissatisfaction" with the doctrine. *Standard Oil Division, American Oil Co. v. Starks*, 528 F.2d 201, 203 (7th Cir. 1975).

The years since this Court's decision in *Dalehite* and *Larson* have resulted in confusion and inconsistency

[11] The Seventh Circuit fails to support its off-hand conclusion that this action is a tort. A breach of fiduciary duties by the FDIC in similar circumstances has been held *not* to be a tort. In *Corbin v. Federal Reserve Bank of New York* 458 F.Supp. 143, 146 (S.D. N.Y. 1978), plaintiff-trustee filed suit against several defendants including the FDIC in its corporate capacity and as receiver of Franklin National Bank alleging that certain provisions of the purchase-assumption transaction were inequitable to creditors and in breach of the Receiver's fiduciary duty to creditors. The Court held that the breach of fiduciary duty to the creditors by the receiver was "not a tort claim within the meaning of the FTCA" (p. 146 Fn 4) and that the receiver did not have unlimited discretion to set the terms of a transfer of assets to the FDIC in its corporate capacity. See also *Woodbury v. United States* 192 F.Supp. 924, 937-38 (D. Or. 1961), aff'd 313 F.2d 291, 294 (9th Cir. 1963).

relating to the issues herein raised. This Court should grant this Petition to settle the uneasy relationship between the FTCA, "discretionary" immunity and sue-and-be-sued waivers of immunity.

THE DECISION OF THE SEVENTH CIRCUIT GRANTING IMMUNITY TO THE FDIC ON UNASSUMED CLAIMS OF CREDITORS ARISING FROM THE PURCHASE-ASSUMPTION TRANSACTION IS IN CONFLICT WITH THE DECISION OF THE NINTH CIRCUIT IN *FIRST EMPIRE* AFFIRMING A JUDGMENT AGAINST THE FDIC FOR CLAIMS OF CREDITORS NOT ASSUMED IN A PURCHASE-ASSUMPTION TRANSACTION.

The relationship of sue-and-be-sued amenability to suit and the FTCA delineation of immunity is made more uneasy by the conflict between the Ninth and Seventh Circuit Courts of Appeal on similar transactional facts. Other cases involving similar facts and issues are currently pending in many lower courts.[12] Lower courts will continue to face the dilemma of FDIC immunity because the conflict between circuits and future decisions can result only in more confusion as courts line up behind one circuit or the other, or worse yet, attempt to harmonize the two opinions. The issues involved are ripe for decision by this Court which has the benefit of clear but conflicting opinions by the Seventh and Ninth Circuits. Because of the intricate issues involved, this Court should provide guidance to the lower courts on these issues.

[12] In the Petition for Writ of Certiorari filed by the FDIC in *First Empire*, the FDIC points out that the question presented arises frequently and that at the time of the filing of that petition, over 40 cases in the lower courts involved this question. The petition also points out that since 1970, sixty-one banks have failed and that more than two-thirds of these were liquidated by the FDIC through the use of purchase-assumption transactions. (Petition for Writ of Certiorari, *FDIC v. First Empire-New York et al.*, cert. denied, ... U.S. ....., 99 S.Ct. 293 (Oct. 16, 1978)).

The transactional facts of this case present the same issues decided in *First Empire* by the Ninth Circuit. At the time of insolvency of NOB, Citizens had a claim against NOB in the amount of $348,000 based on the Gananda loan and was in possession of a correspondent account of NOB in the amount of $300,868. Both the Gananda loan and NOB's correspondent account were transferred to the FDIC in its corporate capacity under the purchase-assumption transaction. The FDIC demanded payment of the amount in the correspondent account and denied liability on Citizens' claim. When Citizens refused to comply and claimed a set-off, the FDIC in its corporate capacity sued Citizens to recover the amount in the correspondent account. Citizens claimed a set-off and asked for judgment in the excess amount owed to it. Orders were entered in essence denying Citizens' set-off and Citizens' claim for the excess amount.

In *First Empire*, the FDIC liquidated the United States National Bank ("USNB") through use of a purchase-assumption transaction. In that case, the plaintiff banks had claims against USNB based upon certain standby letters of credit which were excluded from the purchase-assumption transaction agreement and rejected as claims by the FDIC as receiver. Plaintiffs were also in possession of correspondent accounts belonging to USNB. The FDIC demanded that plaintiff banks turn over the correspondent accounts to the FDIC. As here, the plaintiffs refused to comply, claimed the right to set off the correspondent accounts against their claims against USNB and sued the FDIC for the balance of their claim after the amount of the set-off. The Ninth Circuit affirmed the right of set-off and entered judgment against the FDIC for the balance.

The question facing the Ninth Circuit in *First Empire* was the same as that facing the Seventh Circuit in this case. In *First Empire* the Court stated the position of the creditors, whose claims were not assumed, and the FDIC as follows:

> "Crocker's assumption [of liabilities pursuant to the purchase-assumption transaction], carrying with it assurance of payment in full of the claims assumed, amounted to a distribution by the Receiver [FDIC] *in which the plaintiffs were entitled by law to share ratably. Accordingly they seek to recover from the FDIC the amount of their claims in full.*" 572 F.2d 1361, 1363. [Emphasis added]
>
> * * *
>
> "[The FDIC] seeks not only to avoid liability on the letters of credit but also to recover from appellants the sum owed to USNB on the off set claims." 572 F.2d 1361, 1366.

As stated by the Seventh Circuit, Citizens argues that the:

> "FDIC acted wrongfully in exceeding its statutory authority, thereby depriving Citizens of its right to share pro rata with other creditors and has relied upon the Ninth Circuit's First Empire Bank decision." (App. A p. 8a)

In *First Empire*, the FDIC claimed that it was immune from plaintiffs' claims on the basis of the FTCA. The Court, however, implicitly overruled this argument by affirming the set-off and ordering that judgment in full be entered on behalf of each plaintiff. The Ninth Circuit thoroughly reviewed the statutory authority and limitations of the FDIC under the NBA and FDIA and held:

> "We conclude that the responsibiiity lies on the FDIC under Section 194 to compensate appellants for its failure as Receiver to make distributions ratably. Had it insisted that these appellants be included in the purchase and assumption agreement as creditors with claims assumed by Crocker, as it should have done, it would then have had to satisfy Crocker by adding to the amount borrowed from the Corporation and paid to Crocker the full amount of the claims. That sum appellants are now entitled to receive from the FDIC." 572 F.2d 1361 at p. 1371.[13]

The Seventh Circuit recognizes this conflict and points out that:

> "[T]he court [in *First Empire*] in its opinion completely ignored the issue so raised and held FDIC liable without even mentioning the immunity argument, the Federal Tort Claims Act or the *Safeway Portland* decision." (App. A p. 15a)[14]

The reason for the Ninth Circuit decision in *First Empire* would appear to be its analysis that the FDIC exceeded the statutory authority given to it and a recognition that these types of claims could not be pigeonholed

[13] In reaching this conclusion the Court pointed out that Congress did not intend the FDIC to have the power it claims:

> "In our judgment it could not have been the congressional intent, upon balance, to have the fiscal integrity of the deposit insurance fund (which can be adequately protected by other more equitable means) outweigh the policy of equitable and ratable payment of creditors in this manner and to permit the FDIC, whenever it felt its action to be reasonable and to serve to protect the deposit insurance fund against loss, to prefer some creditors over others—paying some in full while others received little or nothing. . ." 572 F.2d at p. 1371.

[14] The Seventh Circuit attempts to guess why the Court ignored the arguments and reasons that the Ninth Circuit may have ignored the immunity question because it relied on *Baker v. F & F Investment*, 489 F.2d 829 (7th Cir. 1973) holding that a right based upon a federal statute is not subject to the FTCA. *Baker*, however, as the Seventh Circuit admits was contrary to the Ninth Circuit's decision in 1974 in *Safeway Portland EFCU v. FDIC*, 506 F.2d 1213 (9th Cir. 1974). It is not reasonable to assume that the 9th Circuit overruled its own prior decision in *Safeway* to adopt the Seventh Circuit position in *Baker*—all without any discussion in the *First Empire* decision. Even if this were so, the *First Empire* decision is in conflict with the earlier Ninth Circuit opinion as the Seventh Circuit admits. (App. A p. 11a)

as "ordinary common-law tort[s]" to which the FTCA would apply.[15] Whatever the reason for the conflict, however, the practical problems arising out of that conflict will continue to plague the courts and claimants.

The Seventh Circuit bases its decision affirming immunity upon the Ninth Circuit's earlier opinion in *Safeway*. The claim in *Safeway* was based on fraud and misrepresentation (arising under the securities laws). Misrepresentation and fraud are however the type of ordinary common-law tort to which the FTCA (and the exceptions) was intended to apply. The fact that misrepresentation and fraud have been incorporated into the securities laws does not change the substantive nature of the claim. The Ninth Circuit on the other hand, implicitly recognized that a claim based upon the exclusion of liabilities through the use of a purchase-assumption transaction was in excess of the FDIC's statutory authority for which immunity would not attach and to which *Safeway* was inapplicable.

Other courts have begun to recognize the potential issues faced squarely by the Seventh and Ninth Circuits but no other definitive opinion has emerged. See *British Columbia Investment Co. v. FDIC*, 420 F.Supp. 1217, 1223 (S.D. Cal. 1976) (FTCA is not applicable); *Colonial Bank & Trust Co. v. American Bankshares*, 439 F.Supp. 797, 802-804 (E.D. Wisc. 1977) (FTCA is applicable to "tortious misrepresentation"). One possible reason for

[15] The Ninth Circuit is an extremely experienced court in dealing with the complex and diverse claims asserted against the FDIC and similar agencies. See *International Westminster Bank Ltd. v. FDIC* 509 F.2d 641 (9th Cir. 1975); *Safeway Portland EFCU v. FDIC*, 506 F.2d 1213 (9th Cir. 1974); *FDIC v. Meo* 505 F.2d 790, 793 (9th Cir. 1974); *Hancock Financial Corp. v. FSLIC* 492 F.2d 1325 (9th Cir. 1974); *FDIC v. Glickman* 450 F.2d 416 (9th Cir. 1971); and *FDIC v. Mademoiselle of California* 379 F.2d 660 (9th Cir. 1967) The decision of the Seventh Circuit on the issues in this case, is, in essence, its maiden attempt.

this is the apparent lack of consistency by the FDIC in asserting and presenting its theory that it is immune in these transactions. In the Court below, for example, the theory of immunity under the FTCA was presented in an off-hand manner and the applicability of the 12 U.S.C. § 2680(a) exception was not mentioned at all. The Seventh Circuit decision was made without the benefit of analysis by the parties. In *First Empire*, when the FDIC's claim of immunity was ignored, the FDIC did not file a petition for rehearing and did not seek review of that issue in its Petition. (*Supra* p. 16 Fn. 12) In a related case arising from the NOB insolvency and cited by Citizens in the Seventh Circuit,[16] the FDIC did not even raise the issue of immunity under the FTCA in motions to dismiss securities fraud claims against NOB and asserted against the FDIC in its corporate capacity on the same theories herein presented.

Furthermore, as part of the purchase-assumption transaction, (the FDIC-FDIC contract) the FDIC implies that it is amenable to suit and makes promises to itself as Receiver based upon this assumption. In fact, the FDIC in its corporate capacity agrees that if claims of creditors arise which are not disclosed on NOB's books the FDIC will hold the assuming bank harmless from any such interest and that any such interest "shall be established by agreement with or in a suit against" the FDIC in its corporate capacity.

[16] In the Seventh Circuit, Citizens also cited the opinion written by Judge Thomas in the United States District Court for the Northern District of Ohio (Eastern Division), *Braun v. FDIC* et al. Nos. C75-681, C76-8, C76-11, C76-420, C76-1324, all of which arose out of the insolvency of NOB. The Court there held that a purchase-assumption transaction which left no assets in the receivership estate for some creditors was beyond the FDIC statutory powers. The Court held that the FDIC in its corporate capacity would have to stand ready to pay such claims. The opinion however was withdrawn shortly after motion by the FDIC that the issues were not ripe for adjudication.

The conflict between the Seventh and Ninth Circuits should be resolved by this Court because of the importance and complexity of the issues. The conflict is confusing to federal instrumentalities and claimants alike. Furthermore, the inequity to claimants such as Citizens whose claim was involved in a Circuit where the immunity of the FDIC is affirmed, is obvious.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-1814

FEDERAL DEPOSIT INSURANCE CORPORATION,

Plaintiff-Appellee,

v.

CITIZENS BANK & TRUST COMPANY OF PARK RIDGE, ILLINOIS,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-C-3092—**J. Sam Perry**, *Judge.*

ARGUED FEBRUARY 13, 1978—DECIDED FEBRUARY 2, 1979

Before FAIRCHILD, *Chief Judge,* TONE, *Circuit Judge,* and SHARP, *District Judge.**

TONE, *Circuit Judge.* Federal Deposit Insurance Corporation, after becoming the receiver of an insolvent state bank, entered into a so-called purchase and assumption transaction under 12 U.S.C. § 1823(e) whereby it, as receiver, assigned to itself in its corporate capacity the insolvent bank's claim against Citizens Bank

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* The Honorable Allen Sharp, District Judge of the United States District Court for the Northern District of Indiana, sitting by designation.

& Trust Company. In FDIC's suit on the claim, Citizens asserted a set-off and counterclaim based on alleged liability of the insolvent bank to Citizens arising out of an unrelated transaction. The issue we find to be controlling is whether the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, *et seq.*, withdrew the sue-and-be-sued liability of FDIC under 12 U.S.C. § 1819 for torts not covered by that Act and thus makes FDIC immune from Citizens' claim.

When an insured state bank becomes insolvent, FDIC may accept appointment as the receiver, if the appointment is authorized by state law and tendered in accordance with that law. 12 U.S.C. § 1821(e). When acting as a receiver of a closed bank, FDIC may deal with itself. Thus it may act in two capacities, as receiver and on its own behalf as insurer of deposits and often as a creditor.

By an amendment to the Federal Deposit Insurance Act adopted in 1935, 49 Stat. 684, FDIC was authorized to enter into purchase and assumption agreements with respect to the assets of failing or closed banks. 12 U.S.C. § 1823(e).[1] Under this provision, FDIC may contract with another bank to have the latter assume the deposit and other liabilities and purchase the assets of the insolvent bank, and may lend the insolvent bank money in sufficient amount to bring the assumed liabilities and purchased assets into balance. FDIC may also make loans secured "by assets of an open or closed insured bank, which loans may be in subordination to the rights of depositors and other creditors," or may purchase such assets or guarantee the assuming bank against loss by reason of the purchase and assumption.

This case arose out of the insolvency of the Northern Ohio Bank (NOB). Before the insolvency, NOB made a loan to Gananda Development Corporation in which

[1] The power was initially granted until July 1, 1936, was extended until July 1, 1938, 49 Stat. 1237 (1936), and was subsequently made permanent, 52 Stat. 767 (1938). The section was amended in 1950 to add the second paragraph, which is not involved in this case. 64 Stat. 873.

defendant Citizens participated to the extent of $348,000. Gananda defaulted on the loan. Thereafter, Citizens, contending that NOB had induced Citizens' participation by misrepresentations concerning collateral and had failed to obtain collateral after agreeing to do so, attempted to negotiate with NOB for the return of the $348,000.

NOB maintained a correspondent account with Citizens, which at the time of the Gananda default was in the amount of $300,868.84. In the ensuing months this balance remained unchanged, and Citizens sent monthly statements to NOB accordingly.

On Friday, February 14, 1975, the Superintendent of Banks for the State of Ohio took possession of NOB and appointed FDIC as its receiver. On Monday, February 17, 1975, FDIC filed an ex parte petition in an Ohio court seeking approval of the purchase and assumption transaction contested in this suit, and the court granted the petition.

This transaction was reflected in two contracts, one between FDIC as receiver and National City Bank of Cleveland and the other between FDIC as receiver and itself in its corporate capacity. By the first, National City Bank purchased from the receiver certain "acceptable" NOB assets, consisting of cash, deposits in other banks, and certain "other assets of sound banking quality," and assumed NOB's deposit liabilities and certain other liabilities. National City Bank paid $3,750,000 for the value of the ongoing business of NOB. By the second contract, FDIC in its corporate capacity purchased from itself as receiver the other assets of NOB, which were generally described as assets carried on the books of NOB at an amount greater than their actual value and unacceptable to the assuming bank, for $90,250,000, which sum was included in the assets turned over to National City Bank. Under the second contract FDIC in its corporate capacity was to retain all net recoveries from the assets assigned to it until it had recovered the $90,250,000, costs of liquidation, and 6½ per cent interest on the unrecovered balance of the $90,250,000 calculated monthly.

The Gananda loan was among the "unacceptable" assets transferred by the second contract to FDIC in its corporate capacity, as was, for reasons FDIC has never explained, NOB's balance in the correspondent account with Citizens. The purchase and assumption transaction effectively left the receivership estate without assets of value or prospect of receiving any. This, in turn, had the effect of preventing recovery by Citizens and any other creditors to whom National City Bank did not assume liability.

On March 12, 1975, FDIC, apparently as receiver,[2] wrote to Citizens demanding payment of the balance in NOB's correspondent account. In its letter in response, Citizens refused to comply with the demand, stating that it might set off FDIC's claim against its tort claim against NOB. In another letter to FDIC dated May 27, 1975, Citizens asserted its claim that NOB was liable to Citizens in the amount of $348,000 by reason of the Gananda transaction and stated that it had set off the correspondent account balance of $300,868.84.

On August 19, 1975, FDIC, in its corporate capacity, brought the instant action against Citizens in the Northern District of Illinois, where Citizens operates its banking business, to recover the $300,868.84. Thereafter Citizens filed a timely claim against FDIC as receiver, which rejected the claim. Answering the complaint in this action, Citizens challenged jurisdiction, and asserted affirmative defenses, including fraud, breach of contract, and negligence on the part of NOB in the Gananda loan transaction, which entitled it to a set-off in the amount claimed by FDIC. Citizens also counterclaimed for the approximately $48,000 difference between the amount of its participation in the Gananda loan transaction and the amount of the set-off. In addition Citizens moved to transfer the case to the Northern District of Ohio under 28 U.S.C. § 1404(a).

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[2] The copy of the letter in the record shows it to have been signed "William S. Bryant, Liquidator." Bryant signed in this way for FDIC as receiver in the contracts reflecting the purchase and assumption transaction.

The District Court denied Citizens' motion to transfer and granted FDIC's motion to strike the affirmative defenses and counterclaims. Shortly thereafter, the court, on FDIC's motion, entered summary judgment against Citizens, from which it appeals. We affirm the judgment.

I.

Citizens argues that the District Court did not have jurisdiction over this case because 12 U.S.C. § 1819 Fourth, which provides that FDIC may sue and be sued and vests jurisdiction over "[a]ll suits of a civil nature in common law or in equity to which the corporation [FDIC] shall be a party" in the United States District Court, excepts from that jurisdiction suits to which FDIC is a party in its capacity as receiver of a state bank and which involve only the rights or obligations of creditors and the state bank under state law. Citizens' characterization of this suit as one which falls within this exception rests entirely on *FDIC v. Ashley*, 408 F.Supp. 591 (E.D. Mich. 1976), which was reversed on appeal after oral argument in the case at bar, *FDIC v. Ashley*, No. 76-2416 (6th Cir., decided October 4, 1978).

In its opinion the Sixth Circuit analyzed § 1819 Fourth in detail and concluded that the dual roles created for FDIC by Congress should not be ignored for purposes of jurisdiction. No. 76-2416, slip op. at 5-9. The Sixth Circuit was not persuaded by the argument that because the purchase and assumption transaction required FDIC in its corporate capacity to return to FDIC as receiver sums recovered in excess of the purchase price it had paid the receivership for the "unacceptable assets," it was doing no more than acting as a receiver. The court pointed out that FDIC bore the risk of loss as to recovery on the "unacceptable assets." No. 76-2416, slip op. at 10. Furthermore, FDIC did not participate in the assignment for the purpose of creating federal jurisdiction.

We agree with the Sixth Circuit. *See also, FDIC v. Godshall*, 558 F.2d 220 (4th Cir. 1976), and *FDIC v. Abraham*, 439 F.Supp. 1150 (E.D. La. 1977). The District Court here correctly determined that federal jurisdiction exists.

II.

Citizens, claiming error in the denial of its motion to transfer under 28 U.S.C. § 1404(a), points to the pendency in the Northern District of Ohio of nine other cases arising from the same bank receivership. FDIC as receiver and in its corporate capacity is a party in most of these cases, and Citizens was a party in two of them at the time of its motion and is still a party in one. Some of the cases, according to Citizens, present the same banking law issues that are presented in the case at bar. FDIC asserts that there is some doubt about whether Citizens could have been served in Ohio, although Citizens says it could have been. We shall not resolve that dispute. It is enough that it is not insubstantial and that there are other considerations militating against transfer.

Citizens does not contend that the Northern District of Illinois, where it maintains its place of business, is an inconvenient forum. Although Citizens asserts that the witnesses it needs to call and much of the evidence is located in Ohio, FDIC asserts that the witnesses it will need to examine are officers and employees of Citizens, who are in Illinois. Under these circumstances the convenience of parties and witnesses does not weigh in favor of transfer. *Marbury-Pattillo Construction Co. v. Bayside Warehouse Co.*, 490 F.2d 155 (5th Cir. 1974).

Finally, the trial court must give some weight to the plaintiff's choice of forum. *Cf. Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). That factor, together with the fact that Citizens is at home in the Northern District of Illinois and the absence of any compelling reason for transfer, makes it impossible for us to say that the trial court abused its broad discretion under 28 U.S.C. § 1404(a) in denying the motion to transfer.

III.

FDIC argues that it is immune from the claim Citizens attempts to assert by set-off and counterclaim, because the claim is in tort and therefore the exclusive remedy, if any remedy exists, would be under the Federal Tort Claims Act, and that Act has withdrawn any previously existing waiver of immunity with respect to claims of the kind Citizens seeks to assert.[3] Our determination of the issue thus raised must begin with an analysis of the nature of Citizens' claim.

Citizens insists that its claim does not sound in tort and therefore is not subject to the Federal Tort Claims Act. Thus it says,

> Citizens does not allege a tort committed by a government agency or its employee. Citizens does claim that NOB committed fraud, negligence and/or breach of contract in obtaining Citizens participation in the Gananda loan and that the FDIC as successor in interest to NOB and as the alleged owner of all of the assets of NOB, is subject to Citizens right of set off and answerable for the remainder of the loss of Citizens. Clearly Citizens' claims are contract claims.

Citizens does not suggest any theory or cite any authority for its assertion that FDIC in its corporate capacity is "successor in interest to NOB" and that because FDIC in that capacity acquired certain of NOB's assets it is liable on Citizens' claim against NOB. FDIC in its corporate capacity accepted an assignment of the assets of the receivership that were not assigned to City National Bank, including the claim against Citizens and the claim against Gananda. FDIC is merely an assignee of those claims. It assumed no liabilities of the receivership and entered into no contract with Citizens. There is accordingly no basis for Citizens'

[3] Citizens has not complied with the prerequisite to suit imposed by the Act, which in itself would be a ground for dismissal of this action if the Act applies, but that point becomes academic in light of our holding that the Act immunizes FDIC altogether from claims of the kind involved here.

assertion that its counterclaim against FDIC is a contract claim.

That Citizens' claim is in tort is apparent from an analysis of the facts and the applicable law; if Citizens is right in its interpretation of § 1823(e), an interpretation which the Ninth Circuit has adopted in *First Empire Bank v. FDIC*, 572 F.2d 1361, *cert. denied*, 47 U.S.L.W. 3262 (Oct. 16, 1978), FDIC in its capacity as receiver had a duty to accord creditors of NOB their right to pro rata distribution, a right which in the case at bar derives from state law.[4] Furthermore, FDIC may very well have had a duty as receiver to protect Citizens' right to a set-off against the receivership estate's claim against Citizens. Assuming that these duties existed, FDIC breached them. Absent sovereign immunity, it would be liable for that breach, as any other corporate receiver would be, in its corporate capacity. Liability for breach of a duty imposed by statute or case law and not by contract is in tort.

This conclusion would end the matter if we held Citizens strictly to the theory it argued before us. Despite its disclaimer quoted above, however, Citizens has also argued that FDIC acted wrongfully in exceeding its statutory authority, thereby depriving Citizens of its right to share pro rata with other creditors, and has relied upon the Ninth Circuit's *First Empire Bank* decision. FDIC in its brief correctly analyzes Citizens' claim as one based on FDIC's alleged tort and treats it as such. For these reasons, and because the facts supporting a tort claim are properly before us, we consider Citizens to be asserting a claim based on FDIC's tort and proceed to consider whether such a claim can be asserted.

Before the adoption of the Federal Tort Claims Act, FDIC would have been amenable to suit on a claim such

[4] *See Bishop v. Fulton*, 128 Ohio St. 485, 191 N.E. 752 (1934), together with 12 U.S.C. §§ 1819 and 1821(g) and Ohio Rev. Code § 1113.05(M) (Page). In the *First Empire Bank* case the pro rata distribution rule was supplied by federal law because a national bank was involved.

as Citizens' by reason of the sue-and-be-sued language in 12 U.S.C. § 1819 Fourth. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 388-389 (1939); *Federal Housing Authority v. Burr*, 309 U.S. 242, 245 (1940). As the *Keifer* decision pointed out, whether a governmental corporation shares the government's immunity depends on whether Congress has chosen to so provide, and sue-and-be-sued clauses such as those contained in § 1819 Fourth were held to be waivers of immunity in *Keifer* and subsequent cases. 306 U.S. at 388-389.

The Federal Tort Claims Act modified the sue-and-be-sued doctrine by making a suit under the Act the exclusive remedy for any tort covered by the Act. The question is whether it also withdrew the sue-and-be-sued waiver of sovereign immunity for torts excepted from the Act. All the courts that have specifically addressed the question, except ours, have held that it did.

The relevant statutory language appears in three sections of the Act, 28 U.S.C. §§ 1346(b), 2679(a), and 2680. The pertinent portions of those sections are as follows:

> Section 1346(b)—
>
> . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury, or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> Section 2679(a)—
>
> The authority of any federal agency [5] to sue and be sued in its own name shall not be construed to

[5] FDIC is unquestionably a "federal agency" within the meaning of § 2679(a). *Safeway Portland Employees' Federal Credit Union v. FDIC*, 506 F.2d 1213, 1215 (9th Cir. 1974).

authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

Section 2680—

The provisions of this chapter [ch. 171, §§ 2671-2680] and section 1346(b) of this title shall not apply to—

(a) any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation . . . .

Arguably, a claim such as Citizens, although it would be cognizable under § 1346(b) in the absence of § 2680(a), falls within that exception[6] and is therefore not cognizable under § 1346(b); and, because it is not, § 2679(a) does not make the remedy provided by § 1346(a) exclusive.

The federal courts, however, with the exceptions noted below, have held otherwise. The Second, Tenth, and District of Columbia Circuits and district courts in several other circuits have held that the suability of sue-and-be-sued federal agencies and corporations is now governed solely by the Federal Tort Claims Act, and that governmental immunity extends to classes of torts excepted from the coverage of that Act. *Edelman v. FHA*, 382 F.2d 594, 596 (2d Cir. 1967); *Freeling v. FDIC*, 221 F.Supp. 955 (W.D. Okla. 1962), *aff'd*, 326 F.2d 971 (10th Cir. 1963); *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute*, 566 F.2d 289, 295-299 (D.C. Cir. 1977); *Davis v. FDIC*, 369 F.Supp. 277, 279-280 (D. Colo. 1974); *Crockett v. Citizens and Southern Financial Corp.*, 349 F.Supp. 1104, 1105 (N.D. Ga. 1972); *Magellsen v. FDIC*, 341 F.Supp. 1031, 1033-1034 (D. Mont. 1972); *Mullins v. First National Exchange Bank*, 275 F.Supp.

[6] Citizens' claim is based upon the acts of FDIC in the execution of 12 U.S.C. § 1823(e). If FDIC did commit a tort, it resulted from a misinterpretation of § 1823(e), not from acting without due care.

712, 719-720 (W.D. Va. 1967); *United States v. Delta Industries, Inc.*, 275 F.Supp. 934, 936-937 (N.D. Ohio 1966); and *James v. FDIC*, 231 F.Supp. 475, 477 (W.D. La. 1964). The Ninth Circuit aligned itself with these other circuits in a carefully reasoned opinion in 1974, *Safeway Portland E.F.C.U. v. FDIC*, 506 F.2d 1213 (9th Cir. 1974), but reached an arguably contrary result recently in *First Empire Bank v. FDIC*, *supra*, without even mentioning the problem of suability of FDIC or its earlier *Safeway Portland* decision.

Our own decision in *FSLIC v. Quinn*, 419 F.2d 1014, 1017-1018 (1969), while it rests on the sovereign immunity of the governmental corporation without mentioning the Federal Tort Claims Act, is consistent with these cases. Recently, in *Colonial Bank & Trust Co. v. American Bankshares Corp.*, 439 F.Supp. 797, 802-803 (E.D. Wis. 1977), Judge Warren followed the above line of cases, citing *Freeling* and *Safeway Portland*, and held FDIC immune against a tort action falling within the exception provision of 28 U.S.C. § 2680(h).[7]

In *Baker v. F&F Investment Co.*, 489 F.2d 829, 835-836 (7th Cir. 1973), however, this court expressed a view in conflict with the uniform decisions of other circuits, without mentioning those decisions. The actual holding in *Baker* was that a claim under the Civil Rights Acts, 42 U.S.C. §§ 1981 and 1982, against federal sue-and-be-sued corporations and agencies was not barred by the Federal Tort Claims Act. The court reasoned that because the claim arose under federal law it was not within the ambit of the Act, citing *United States v. Smith*, 324 F.2d 622, 625 (5th Cir. 1963), and *Feres v. United States*, 340 U.S. 135, 146 (1950), a holding which has no application here and which therefore need not be considered further.[8] The court went on to say, however,

[7] The court did not mention *Baker v. F&F Investment Co.*, discussed in the text immediately following.

[8] Compare the *Feres* case with *Hatahly v. United States*, 351 U.S. 173 (1956). It should also be noted that the conduct alleged in *Baker*, like that in *Feres*, was not the kind of conduct a private person (see § 1346(b)) would ever have an opportunity

(Footnote continued on following page)

that even if a claim arising under state law had been alleged, it would have been within the interference-with-contract-right exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(h), so §§ 1346(b) and 2679(a) would not limit the pre-Act sue-and-be-sued authority. This was a logical reading of the language of the Act, but one which, by reason of shortcomings in the briefs, was arrived at without the benefit of the relevant legislative history referred to below or the reasoning of other courts. The interpretation of the exclusive jurisdiction and exceptions provisions of the Act, for which the case has never been followed or even cited,[9] was at most alternative support for a result already reached on another ground and therefore unnecessary to the decision.

We do not lightly undertake to reexamine an earlier precedent of this circuit, even when it is in conflict with decisions of other circuits. The suability of a governmental corporation, however, is an issue of national law on which it is especially important that the law among the circuits should be uniform. It would be worse than incongruous if the vulnerability of a governmental corporation such as FDIC to a suit for tort depended upon the circuit in which the action was brought. Forum shopping would be encouraged, and transferability of

[8] *continued*
to engage in, which suggests that Congress did not intend the Federal Tort Claims Act to apply. *Cf. Feres*, 340 U.S. at 141-142. A private person could, of course, be a receiver of a state bank.

[9] District Courts have relied on *Baker* as authority for the proposition that the Federal Tort Claims Act does not apply to tort claims based on federal law, *Blessing v. United States*, 447 F.Supp. 1160, 1186 n.37 (E.D. Pa. 1978) and *Davis v. United States*, 395 F.Supp. 793, 795-796 (D. Neb. 1975), and have cited it for its general discussion of *Keifer* and the sue-and-be-sued language as waiver of sovereign immunity, *e.g.*, *United States v. American National Bank & Trust Co.*, 443 F.Supp. 167, 170 (N.D. Ill. 1977) and *Wright v. National Archives and Records Service*, 388 F.Supp. 1205, 1209 n.9 (D. Md. 1975). We have cited it for its discussion of 42 U.S.C. §§ 1981 and 1982. *E.g.*, *City of Milwaukee v. Saxbe*, 546 F.2d 693, 703 (7th Cir. 1976).

cases under § 1404(a) and even under § 1406(a) of Title 28 would be inhibited. Especially when, as in *Baker*, our expression of opinion on such an issue was unnecessary to the decision and was made without adequate briefing, we have a duty to reexamine the matter.

Having now had the benefit of a review of the legislative history and a study of the decisons of other circuits, we hold that the waiver of immunity from tort liability of a federal agency or governmental corporation such as FDIC is defined in the Federal Tort Claims Act, and that sue-and-be-sued authority does not permit suit outside that Act for torts excepted from the coverage of that Act. In so holding we align this circuit with the decisions of all the courts in other circuits that have addressed the question.[10]

Those decisions rely on the apparent intent of Congress in adopting the Federal Tort Claims Act to define comprehensively the tort liability of the United States and its instrumentalities. As the Second Circuit said in *Edelman*,

> [T]here is no basis for applying the exception more narrowly than the Act itself. Indeed, it defies common sense to argue that the intent of Congress was that while remedies for negligent torts had to be pursued subject to the limitations of the FTCA, remedies for intentional torts could be obtained outside of these limitations even though as to most agencies such suits were barred altogether.

382 F.2d at 597. More recently, in *Expeditions Unlimited*, *supra*, the District of Columbia Circuit said, referring to exception (h) in § 2680,

> We conclude from the structure of the Tort Claims Act, and from the legislative reports accompanying its passage, that Congress probably did not intend to leave unaffected by the Act the categories of suits excepted by § 2680(h). While primarily

[10] This opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing in banc on the question ruled upon in the text.

> seeking to expand governmental liability for torts, it appears to us that Congress also sought to systematize and centralize the immunity laws. . . . One evidence of this appears in § 2679(a) of the statute, which in essence renders ineffective any other laws allowing suit or creating remedies against an agency, where the actions "are cognizable under section 1346(b)." . . . Another evidence of this centralizing impulse appears in the context of exceptions clause § 2680(a). . . . This section sets forth the category of discretionary activity, for which immunity has traditionally been granted. That Congress bothered to include it in the exceptions section is consistent with the view that it meant to embody, within § 2680 all of the instances in which immunity is to exist under the statute. It seems to us an unreasonable conclusion, at least in the instances of exceptions (a) and (h), that Congress intended for courts to go beyond the Act, and inquire into common law immunity status and alternative jurisdictional grounds.

566 F.2d at 297-298 (footnotes omitted). It will be recalled that it is exception (a) that describes Citizens' claim.

The courts have also been influenced by some rather specific language appearing in both the House and Senate Reports[11] on the bill that became the Federal Tort Claims Act:

> This will place torts of "suable" agencies of the United States upon precisely the same footing as torts of "nonsuable" agencies. In both cases, the suits would be against the United States, subject to the limitations and safeguards of the bill; and in both cases the exceptions of the bill would apply either by way of preventing recovery at all or by way of leaving recovery to some other act, as, for example, the suits in Admiralty Act. It is intended that neither corporate status nor "sue and be sued" clause shall, alone, be the basis for suits for money recovery sounding in tort.

[11] H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945); S. Rep. No. 1400, 79th Cong., 2d Sess. 33-34 (1946).

We agree with the District of Columbia Circuit that it is

> likely that Congress conceived of itself as codifying the immunity law, and eliminating any necessity to look at the common law, once it is concluded that the defendant is a federal agency within the definition of the Act.

566 F.2d at 298. We accordingly adopt what

> has been the consistent practice of the federal courts to read both exceptions (a) and (h) as defining grants of immunity to "federal agencies."

Id. at 298-299.

We are unable to view the Ninth Circuit's recent *First Empire Bank* decision as a deliberate overruling of the earlier explicit and carefully reasoned holding in *Safeway Portland* that the Federal Tort Claims Act is the measure of Congress' waiver of sovereign immunity in tort for FDIC and other government instrumentalities. Although it appears from an examination of the briefs in *First Empire Bank* that FDIC raised the immunity issue and argued that it could only be held liable in tort pursuant to the Federal Tort Claims Act, the court in its opinion completely ignored the issue so raised and held FDIC liable without even mentioning the immunity argument, the Federal Tort Claims Act, or the *Safeway Portland* decision. It would appear likely that the reason for this is that the court accepted the argument made in the claimants' reply brief based on the holding of this court in *Baker v. F&F Investment* that a tort claim arising under federal law is not subject to the Act.[12] As we have noted, the *Baker* case has been

[12] This argument is not available to Citizens in the case at bar, because NOB was a state bank and, as we have noted, the tort claim against FDIC therefore arose under state law. See also note 8, *supra*.

cited by other courts for that holding.[13] Under all the circumstances, we are of the opinion that the *First Empire Bank* decision was not intended to overrule or erode the Ninth Circuit's *Safeway Portland* holding.

FDIC's immunity is not limited to actions instituted by claimants. The corporation did not waive its sovereign immunity by filing this action against Citizens, except with respect to "matters in recoupment arising out of the same transaction or occurrence which is the subject matter of the suit, to the extent of defeating the plaintiff's claim." *FSLIC v. Quinn, supra,* 419 F.2d at 1017; *Frederick v. United States,* 386 F.2d 481, 487-488 (5th Cir. 1967); 3 *J. Moore's Federal Practice* ¶13.29, p. 13-751 (2d ed. 1978). Justice Jackson said of the doctrine of recoupment in *Rothensies v. Electric Battery Co.,* 329 U.S. 296, 299 (1946),

> It has never been thought to allow one transaction to be offset against another, but only to permit a transaction which is made the subject of suit by a plaintiff to be examined in all its aspects, and judgment to be rendered that does justice in view of the one transaction as a whole.

The transaction which is the subject of Citizens' claim, *viz.,* FDIC's wrongful transfer, as receiver, of assets of NOB to itself in its corporate capacity, is not an aspect of NOB's deposit of funds in the correspondent account in Citizens, which is the subject of FDIC's suit against Citizens. Only if the assignment by which FDIC acquired its title to the claim could also be considered a transaction which is the subject of FDIC's suit could recoupment be allowed. We can find no case which directly or by analogy supports such an expansion of the narrow limits of the doctrine of recoupment. We think the transaction which that doctrine permits "to be examined in all its aspects" is the substantive transaction

[13] See note 9, *supra.* The *Baker* case has not, as pointed out in the text accompanying note 9, been cited for its interpretation of the exclusive jurisdiction and exceptions provisions of the Federal Tort Claims Act, and the reply brief in *First Empire Bank* did not refer to that interpretation.

creating the claim, and does not include an assignment by which the plaintiff acquires ownership of the claim. The doctrine of recoupment is therefore inapplicable.

What we have said renders it unnecessary for us to reach the banking law question which the parties have extensively briefed and which the Ninth Circuit decided in the *First Empire Bank* case. It may well be that FDIC has violated Citizens' rights as a creditor by entering into and executing a purchase and assumption transaction in which the claims of other creditors were preferred over Citizens' claim and no assets were left in the receivership estate from which Citizens can satisfy its claim. The doctrine of sovereign immunity, however, by its very nature, disallows just claims against the sovereign and its instrumentalities.

The judgment of the District Court is affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge,
Honorable Joseph Sam Perry

No. 76 C 3092 Date: March 21, 1977

Federal Deposit Insurance Corp.
v.
Citizens Bank & Trust Co.

This cause comes on upon plaintiff's motion to strike and dismiss the counterclaim and the affirmative defenses of the defendant. The court has read and carefully considered said motion, the memoranda of the respective parties in support thereof and in opposition thereto, and the law, and finds that said motion is well taken and should be granted.

Accordingly, it is ORDERED that said motion be and it hereby is granted; that defendant's counterclaim and affirmative defenses be and they hereby are STRICKEN AND DISMISSED; and that this case be and it hereby is called for status report on April 4, 1977 at 10:00 A.M.

March 22, 1977 /s/ J. S. Perry

APPENDIX C

STATUTES

12 U.S.C. § 91

§ 91. Transfers by bank and other acts in contemplation of insolvency

All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court. R.S. § 5242.

12 U.S.C. § 194

§ 194. Dividends on adjusted claims; distribution of assets

From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in

proportion to the stock by them respectively held. R.S. § 5236.

12 U.S.C. § 1819

§ 1819. Incorporation; powers; seal

Upon June 16, 1933, the Corporation shall become a body corporate and as such shall have power—

First. To adopt and use a corporate seal.

Second. To have succession until dissolved by an Act of Congress.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district or division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect, except that any such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgment in any suit, action, or proceeding in any State, county, municipal, or United States court. The Board of Directors shall designate an agent upon whom service of process may be made in any State, Territory, or jurisdiction in which any insured bank is located.

* * * *

12 U.S.C. § 1821

§ 1821. Permanent Insurance Fund-Composition; amount of deposit insured

Liquidation as closing of bank

(b) For the purposes of this chapter an insured bank shall be deemed to have been closed on account of inability to meet the demands of its depositors in any case in which it has been closed for the purpose of liquidation without adequate provision being made for payment of its depositors.

Corporation as receiver

(c) Notwithstanding any other provision of law, whenever the Comptroller of the Currency shall appoint a receiver other than a conservator of any insured national bank, insured Federal branch of a foreign bank or insured District bank, or of any noninsured national bank or District bank hereafter closed, he shall appoint the Corporation receiver for such closed bank.

Same; powers and duties

(d) Notwithstanding any other provision of law, it shall be the duty of the Corporation as such receiver to cause notice to be given, by advertisement in such newspapers as it may direct, to all persons having claims against such closed bank pursuant to section 193 of this title; to realize upon the assets of such closed bank, having due regard to the condition of credit in the locality; to enforce the individual liability of the stockholders and directors thereof; and to wind up the affairs of such closed bank in conformity with the provisions of law relating to the liquidation of closed national banks, except as herein otherwise provided. The Corporation as such receiver shall pay to itself for its own account such portion of the amounts realized from such liquidation as it shall be entitled to receive on account of its subrogation to the claims of depositors, and it shall pay to depositors and other creditors the net amounts available for distribution to them. The Corporation as such receiver, however, may, in its discretion,

pay dividends on proved claims at any time after the expiration of the period of advertisement made pursuant to section 193 of this title, and no liability shall attach to the Corporation itself or as such receiver by reason of any such payment for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment. With respect to any such closed bank, the Corporation as such receiver shall have all the rights, powers, and privileges now possessed by or hereafter granted by law to a receiver of a national bank or District bank and notwithstanding any other provision of law in the exercise of such rights, powers, and privileges the Corporation shall not be subject to the direction or supervision of the Secretary of the Treasury or the Comptroller of the Currency.

Same; State banks

(e) Whenever any insured State bank (except a District bank) shall have been closed by action of its board of directors or by the authority having supervision of such bank, as the case may be, on account of inability to meet the demands of its depositors, the Corporation shall accept appointment as receiver thereof, if such appointment is tendered by the authority having supervision of such bank, and is authorized or permitted by State law. With respect to any such insured State bank, the Corporation as such receiver shall possess all the rights, powers and privileges granted by State law to a receiver of a State bank.

Payment of insured deposits

(f) Whenever an insured bank shall have been closed on account of inability to meet the demands of its depositors, payment of the insured deposits in such bank shall be made by the Corporation as soon as possible, subject to the provisions of subsection (g) of this section either (1) by cash or (2) by making available to each depositor a transferred deposit in a new bank in the same community or in another insured bank in an amount equal to the insured deposit of such depositor: *Provided*, That the Corporation, in its discre-

tion, may require proof of claims to be filed before paying the insured deposits, and that in any case where the Corporation is not satisfied as to the validity of a claim for an insured deposit, it may require the final determination of a court of competent jurisdiction before paying such claim.

Subrogation

(g) In the case of a closed national bank or District bank, the Corporation, upon the payment to any depositor as provided in subsection (f) of this section, shall be subrogated to all rights of the depositor against the closed bank to the extent of such payment. In the case of any other closed insured bank, the Corporation shall not make any payment to any depositor until the right of the Corporation to be subrogated to the rights of such depositor on the same basis as provided in the case of a closed national bank under this chapter shall have been recognized either by express provision of State law, by allowance of claims by the authority having supervision of such bank, by assignment of claims by depositors, or by any other effective method. In the case of any closed insured bank, such subrogation shall include the right on the part of the Corporation to receive the same dividends from the proceeds of the assets of such closed bank and recoveries on account of stockholders' liability as would have been payable to the depositor on a claim for the insured deposit, but such depositor shall retain his claim for any uninsured portion of his deposit: *Provided*, That, with respect to any bank which closes after May 25, 1938, the Corporation shall waive, in favor only of any person against whom stockholders' individual liability may be asserted, any claim on account of such liability in excess of the liability, if any, to the bank or its creditors, for the amount unpaid upon his stock in such bank; but any such waiver shall be effected in such manner and on such terms and conditions as will not increase recoveries or dividends on account of claims to which the Corporation is not subrogated: *Provided further*, That the rights of depositors and other creditors of any State bank shall be deter-

mined in accordance with the applicable provisions of State law.

* * * *

12 U.S.C. § 1823

§ 1823. Corporation monies—Investment

Loans to closed banks

(c) In order to reopen a closed insured bank or, when the Corporation has determined that an insured bank is in danger of closing, in order to prevent such closing, the Corporation, in the discretion of its Board of Directors, is authorized to make loans to, or purchase the assets of, or make deposits in, such insured bank, upon such terms and conditions as the Board of Directors may prescribe, when in the opinion of the Board of Directors the continued operation of such bank is essential to provide adequate banking service in the community. Such loans and deposits may be in subordination to the rights of depositors and other creditors.

Sale of assets to Corporation

(d) Receivers or liquidators of insured banks closed on account of inability to meet the demands of their depositors shall be entitled to offer the assets of such banks for sale to the Corporation or as security for loans from the Corporation, upon receiving permission from the appropriate State authority in accordance with express provisions of State law in the case of insured State banks. The proceeds of every such sale or loan shall be utilized for the same purposes and in the same manner as other funds realized from the liquidation of the assets of such banks. In any case where prior to September 21, 1950, the Comptroller of the Currency has appointed a receiver of a closed national bank other than the Corporation, he may, in his discretion, pay dividends on proved claims at any time after the expiration of the period of advertisement made pursuant to section 193 of this title, and no liability shall attach to the Comptroller of the Currency or to the receiver of any such national

bank by reason of any such payment for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment. The Corporation, in its discretion, may make loans on the security of or may purchase and liquidate or sell any part of the assets of an insured bank which is now or may hereafter be closed on account of inability to meet the demands of its depositors, but in any case in which the Corporation is acting as receiver of a closed insured bank, no such loan or purchase shall be made without the approval of a court of competent jurisdiction.

Loans on assets as security

(e) Whenever in the judgment of the Board of Directors such action will reduce the risk or avert a threatened loss to the Corporation and will facilitate a merger or consolidation of an insured bank with another insured bank, or will facilitate the sale of the assets of an open or closed insured bank to and assumption of its liabilities by another insured bank, the Corporation may, upon such terms and conditions as it may determine, make loans secured in whole or in part by assets of an open or closed insured bank, which loans may be in subordination to the rights of depositors and other creditors, or the Corporation may purchase any such assets or may guarantee any other insured bank against loss by reason of its assuming the liabilities and purchasing the assets of an open or closed insured bank. Any insured national bank or District bank, or the Corporation as receiver thereof, is authorized to contract for such sales or loans and to pledge any assets of the bank to secure such loans.

No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been ap-

proved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been continuously, from the time of its execution, an official record of the bank.

28 U.S.C. § 1346

§ 1346. United States as defendant

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2679

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

28 U.S.C. § 2680

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such

statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

O.R.C. § 1113.05 Powers of superintendent upon taking possession of a bank.

The superintendent of banks upon taking possession of the business and property of any bank, shall have the following powers, authority, and duties, without notice and without approval of court, but subject to Chapters 1101., 1103., 1105., 1107., 1109., 1111., 1113., 1115., 1117., 1119., 1121., 1123., 1125., 1127., and 1129. of the Revided Code:

> (M) The superintendent may appoint the federal deposit insurance corporation as receiver for a bank of which he has taken possession and whose deposits are insured by such corporation. Upon filing with the court a certificate indicating the acceptance by the federal deposit insurance corporation, the possession of all the assets, business, and property, and the title thereto, shall be deemed transferred to such corporation. The superintendent shall be forever thereafter relieved from all responsibility and liability in respect to the liquidation of the bank.

The federal deposit insurance corporation may liquidate the bank in such manner as is permitted by the laws of the United States or by Chapter 1113. of the Revised Code, including the right to operate the trust department of any such bank which is qualified to do the business of a trust company.

Supreme Court, U. S.
FILED
JUL 21 1979
MICHAEL RODAK, JR., CLERK

No. 78-1667

In The Supreme Court of the United States

OCTOBER TERM, 1978

CITIZENS BANK & TRUST COMPANY OF PARK RIDGE, ILLINOIS, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In The Supreme Court of the United States

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CITIZENS BANK & TRUST COMPANY OF PARK RIDGE, ILLINOIS, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 592 F.2d 364. The order of the district court (Pet. App. 18a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1979 (Pet. App. 1a). The petition for a writ of certiorari was filed on May 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's claim against the Federal Deposit Insurance Corporation (FDIC) is barred by the Federal Tort Claims Act.

2. Whether a claim barred by the Federal Tort Claims Act may nonetheless be maintained against the Federal Deposit Insurance Corporation because the Federal Deposit Insurance Act allows the FDIC to "sue and be sued."

STATUTES INVOLVED

1. The Federal Tort Claims Act provides in pertinent part:

> (b) * * * [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for * * * loss of property * * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(28 U.S.C. 1346(b).)

* * * * *

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(28 U.S.C. 2679(a).)

* * * * *

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(28 U.S.C. 2680(a)).

2. The Federal Deposit Insurance Act, 12 U.S.C. 1819, provides in pertinent part:

> Upon June 16, 1933, the [Federal Deposit Insurance] Corporation shall become a body corporate and as such shall have power—
>
> * * * * *
>
> Fourth. To sue and be sued, complain and defend, in any court of law or equity, State or Federal. * * * [A]ny such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States. * * *

STATEMENT

On February 14, 1975, the Ohio Superintendent of Banks took possession of the business and property of the Northern Ohio Bank, a state bank chartered under

the laws of Ohio. Pursuant to Ohio law (see Ohio Rev. Code Ann. §1113.05(M) (Page's)) and the Federal Deposit Insurance Act (see 12 U.S.C. 1821(e)), the Superintendent of Banks appointed the Federal Deposit Insurance Corporation (FDIC) receiver of the closed bank. On February 17, 1975, the FDIC as receiver entered into a "purchase and assumption" transaction with National City Bank of Cleveland, pursuant to Ohio Rev. Code Ann. §1113.05(G). National City Bank agreed to assume all of the deposit liabilities, and certain other liabilities, of Northern Ohio Bank and to purchase certain assets of that bank. The FDIC as receiver assigned the remaining assets of Northern Ohio Bank to itself in its corporate capacity in return for $90.25 million in cash, which was then turned over to National City Bank as part of the purchase and assumption transaction. National City Bank thus obtained assets and assumed liabilities in an equivalent amount.[1]

One of the assets of Northern Ohio Bank that National City Bank did not purchase was the closed bank's interest in a loan previously made, in participation with petitioner, to Gananda Development Corporation. Gananda had defaulted on that loan. Another asset of the closed bank that National City Bank did not purchase was the closed bank's correspondent account with petitioner in the amount of $300,868.84. Both of these assets were transferred by the FDIC as receiver to itself in its corporate capacity.

In March 1975 the FDIC demanded that petitioner remit to it the $300,868 in the closed bank's correspondent account. Petitioner refused. The FDIC then brought this action in the United States District Court for the Northern District of Illinois (where petitioner is located) to recover those funds.

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[1] By assuming liabilities of $3.75 million in excess of assets purchased, National City Bank obtained, as an asset, the ongoing business of the closed bank.

Petitioner filed an administrative claim against the FDIC, as receiver, for damages of $348,000—the amount of petitioner's participation in the Gananda loan—against the closed bank. Petitioner alleged that Northern Ohio Bank had wrongfully induced it to participate in the Gananda loan by misrepresenting the existence of collateral and was thus liable to petitioner for its participation in that loan. The FDIC rejected petitioner's claim (Pet. App. 4a), and petitioner sought review of that rejection in state court, where the issue is now pending. See note 2, *infra*.

Petitioner also asserted in this action a right to set off $300,868 of its $348,000 damage claim from the correspondent account that was the subject of the suit, and a counterclaim against the FDIC for $47,131, the balance of its alleged damages. The district court granted the FDIC's motion to strike the set-off defense and the counterclaim and entered summary judgment for the FDIC on its claim to recover the funds in the correspondent account (Pet. App. 18a)

The court of appeals affirmed (Pet. App. 1a–17a). The court concluded that petitioner's claims against the FDIC (whether in the form of a set-off or as a counterclaim) were in essence money damage claims against the FDIC for alleged wrongful conduct, and, as such, were cognizable under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2679(a) (Pet. App. 7a–8a). The court held that the claims were barred by the statutory and discretionary function exception of that Act, 28 U.S.C. 2680(a) (Pet. App. 14a). The court also held that the FDIC's statutory authority to sue and be sued (12 U.S.C. 1819 Fourth) did not provide an independent source of authority on which to base the lawsuit (Pet. App. 8a–15a).

ARGUMENT

The court of appeals reached the correct result, and its decision does not conflict with that of any other

court. Hence, petitioner presents no question warranting this Court's review.

1. The allegation underlying petitioner's set-off and counterclaim is that the FDIC exceeded its authority under 12 U.S.C. 1823(e) because the purchase and assumption transaction did not fully protect petitioner's $348,000 claim against Northern Ohio Bank (Pet. 12).[2] Petitioner to the contrary (Pet. 10, 12), however, the court of appeals did not "indicate[]" that this allegation had merit; it merely analyzed the "nature of [petitioner's] claim" (Pet. App. 7a) and concluded that, "[a]ssuming that these duties [of FDIC] existed" (Pet. App. 8a), the claim sounded in tort and thus was cognizable, if at all, under the Federal Tort Claims Act (Pet. App. 8a, 17a).

Petitioner does not seriously dispute the conclusion that its claim is a tort claim (see Pet. 15 n.11), but it contends that the Federal Tort Claims Act does not apply because "the failure of an agency of the United States to carry out its statutory duty and [its actions] in excess of its power cannot be compared to the liability of a private individual under state law * * * " (Pet. 13). But it has been settled since *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), that the Act's waiver of sovereign immunity does not depend on whether the government's act or omission occurred in performing

[2]Petitioner understandably seeks to bring itself within *First Empire Bank* v. *FDIC*, 572 F.2d 1361 (9th Cir.), cert. denied, No. 78-289 (Oct. 16, 1978), in which the creditors successfully alleged that the purchase and assumption transaction there was an unlawful preference of creditors and a non-ratable dividend. See 12 U.S.C. 91, 194. However, petitioner has never proved the allegations concerning the loan participation transaction necessary to establish itself as a creditor. Petitioner's remedy is an action in state court to establish its claim and to challenge the receiver's failure to pay. Petitioner has filed such an action in the Court of Common Pleas, Cuyahoga County, Ohio; that action is still pending. *Citizens Bank & Trust Company of Park Ridge, Illinois* v. *FDIC*, No. 971118 (filed June 14, 1977).

"uniquely governmental functions." *Id.* at 64.

The court of appeals correctly held that petitioner's claim for money damages from the FDIC for alleged wrongful implementation of its statutory duties was, as a tort claim, barred by the statutory and discretionary function exception of the Federal Tort Claims Act. 28 U.S.C. 1346(b), 2680(a). See *Bub Davis Packing Co.* v. *United States*, 443 F. Supp. 589 (W.D. Tex. 1977), aff'd, 584 F.2d 116 (5th Cir. 1978), cert. denied, No. 78-1284 (April 30, 1979); *Safeway Portland Employees' Federal Credit Union* v. *FDIC*, 506 F.2d 1213 (9th Cir. 1974). In addition, the court of appeals pointed out that petitioner failed to file an administrative claim under 28 U.S.C. 2675(a) (see Pet. App. 7a n.3), and thus the claim is barred under the Act regardless of whether the statutory exception applies. See *DSI Corp.* v. *Secretary of HUD*, 594 F.2d 177, 180 (9th Cir. 1979).[3]

[3]There is no doubt that the court of appeals was correct in holding that a claim "cognizable" under the Federal Tort Claims Act (see 28 U.S.C. 2679(a)) remains so despite the applicability of an exception to the Act, under 28 U.S.C. 2680, barring the claim. See cases cited at Pet. App. 10a-14a. Even if we were to assume that petitioner's claim against the FDIC in this case was not "cognizable" under the Tort Claims Act because the claim, if sustainable on the merits, would not appear to be payable from general United States Treasury funds, (compare *DSI Corp.* v. *Secretary of HUD*, *supra*, 594 F.2d at 179-180), the judgment may still be sustained because petitioner's claim, as a challenge to the FDIC's actions as receiver, should have been brought in the appropriate Ohio state court. See pages 10-11, *infra*.

Moreover, because petitioner's claim for money damages is against the FDIC in its corporate capacity, even if that claim is independent of the Tort Claims Act the FDIC could still invoke an analogous statutory and discretionary function defense. Cf. *Gercey* v. *United States*, 540 F.2d 536 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977) (discretionary function bar applicable to Suits in Admiralty Act); *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1007-1011 (Ct. Cl. 1967) (discretionary function bar applicable to suits under Tucker Act).

Nor is there merit to petitioner's argument (Pet. 14) that application of the discretionary function exception (28 U.S.C. 2680(a)) to the purchase and assumption transaction here will immunize any governmental action, no matter how arbitrary and excessive. As the court of appeals noted, the statute immunizes only those acts done with due care, and if the FDIC committed a tort here, "it resulted from a misinterpretation of [the purchase and assumption statute], not from acting without due care" (Pet. App. 10a n.6).

Finally, little need be said of petitioner's contention (Pet. 15–16) that the "sue-and-be-sued" clause of the Federal Deposit Insurance Act, 12 U.S.C. 1819 Fourth, allows petitioner to maintain its claim for damages here. 28 U.S.C. 2679(a) expressly precludes reliance on "sue-and-be-sued" authority for claims "cognizable" under 28 U.S.C. 1346(b). Petitioner's argument is premised on its belief that the Federal Tort Claims Act is not applicable to these facts (Pet. 15). But as we have shown, petitioner's claim is "cognizable" under the Act insofar as it sounds in tort against the government; the Act simply provides an exception that preserves the government's sovereign immunity for discretionary functions. And as the court of appeals observed, every court of appeals that has considered the question has concluded that the "suability of sue-and-be-sued federal agencies and corporations is now governed solely by the Federal Tort Claims Act, and that governmental immunity extends to classes of torts excepted from the coverage of that Act" (Pet. App. 10a; citations omitted).

Indeed, the only contrary decision was the Seventh Circuit's prior holding in *Baker* v. *F&F Investment Co.*, 489 F.2d 829, 835, 836 (1973), a holding that the court below re-examined and abandoned (Pet. App. 11a–15a). Moreover, as the court of appeals noted (Pet. App. 14a–15a), the House and Senate Reports on the bill that became the Federal Tort Claims Act specifically stated that the bill's intent was to remove "sue

and be sued" clauses as independent bases of government liability for money damages in tort suits. H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945); S. Rep. No. 1400, 79th Cong., 2d Sess. 33–34 (1946). This intent is manifested in Section 2679(a). Thus, petitioner unfairly accuses the court of appeals of "slamm[ing] the door on suits which could have been brought [under a "sue and be sued" clause] prior to the passage of the FTCA" (Pet. 13); it is Congress, for substantial policy reasons, that has "slammed the door."

2. There is no conflict between the decision below and *First Empire Bank* v. *FDIC*, 572 F.2d 1361 (9th Cir.), cert. denied, No. 78–289 (Oct. 16, 1978). In that case, the Ninth Circuit held that the purchase and assumption transaction fashioned by FDIC for the closed bank amounted to a preference of creditors in violation of 12 U.S.C. 91 and was not a "ratable" dividend as required by 12 U.S.C. 194. Although the purchase and assumption transaction involved here shares some similarities with that involved in *First Empire Bank*, and although petitioner strives to portray the decision below as concluding that the FDIC was similarly in violation of statute here (Pet. 10, 18–19), the court of appeals did not reach the question whether the transaction violated ratable distribution requirements, because it held that the FDIC was immune from suit. The court of appeals was merely assuming arguendo such a violation, and FDIC's consequent liability, in order to describe the nature of petitioner's claim. The court stated unambiguously that it was "unnecessary for us to reach the banking law question * * * which the Ninth Circuit decided in the *First Empire Bank* case" (Pet. App. 17a).

Petitioner fares little better with its contention (Pet. 18–22) that the decision below conflicts with *First Empire Bank* on the issue whether FDIC can be sued under the Federal Tort Claims Act. The court of appeals correctly concluded that, although *First Empire Bank* proceeded on the assumption that the FDIC was

amenable to suit, that decision did not even mention, and cannot be read as overruling, the Ninth Circuit's decision, less than four years earlier, in *Safeway Portland Employees' Federal Credit Union* v. *FDIC*, *supra*. In that case, the Ninth Circuit held that the Tort Claims Act precluded any suit premised on the "sue and be sued" clause of 12 U.S.C. 1819 Fourth. In *First Empire Bank*, on the other hand, the disappointed creditors of the closed bank sought direct judicial review of the receivership proceedings. Petitioner could not pursue such a course in this case; it has done so in state court. See note 2, *supra*.

The proper remedy against a closed state bank for a disappointed claimant who contests the disallowance of its claim, or who contests as unratable a receiver's distribution, is judicial review of the receivership proceedings in a state court having jurisdiction over the receivership and receiver.[4] This is true even where the receiver of the state bank is the FDIC. See 12 U.S.C. 1819 Fourth. Money damage claims against a receiver in his individual capacity are not authorized generally (except for fraud) and are barred under federal law where the receiver is the Federal Deposit Insurance Corporation. 28 U.S.C. 2679(a), 2680(a), (h). Whether petitioner will prevail in its state court action remains to be seen, but what is clear is that it is not entitled to vindicate its claim under the Federal Tort Claims Act.

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[4] A claimant whose claim against a closed Ohio bank has been rejected by the receiver, or not paid in accordance with law, may challenge the receiver's action in an Ohio court of competent jurisdiction (here, in the Court of Common Pleas for Cuyahoga County). See Ohio Rev. Code Ann. §§1113.06, 1113.09(C), 1113.12 (Page's); *Busher* v. *Fulton*, 128 Ohio St. 485, 191 N.E. 752 (1934); *Zinner* v. *Guardian Trust Co.*, 4 Ohio Ops. 51, 56 (Ct. Com. Pl. 1935).

Where the closed bank is a national bank, judicial review of the receiver's rejection or improper payment of a claim is in the United States District Court (or appropriate state court) in the district where the national bank is located. 12 U.S.C. 94; 12 U.S.C. 1819 Fourth; *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148 (1976).

The decision here simply holds that, under the circumstances of this case, a claimant has no right to sue or counterclaim against the FDIC for money damages, or to attach funds assigned to the FDIC, in an action by the FDIC to collect assets of the closed bank. In that context, the individual claimant is in effect seeking personal money damages for the FDIC's allegedly wrongful implementation of statutory duties (a damage claim barred by the statutory and discretionary function exception of the Federal Tort Claims Act), and is not seeking judicial supervision of the receivership.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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